Petition

Office - Supreme Court, U
FILED
SEP 14 1981
ALEXANDER L. STEVA
CLERK

81-556

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

No.

ECTORE GREGORIO GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ECTORE G. GARCIA
Pro Se
Petitioner/Defendant

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

No.

ECTORE GREGORIO GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ECTORE G. GARCIA
Pro Se
Petitioner/Defendant

QUESTIONS PRESENTED

1. Whether the failure to sever the Petitioner's trial when a co-defendant proffered that he would offer exculpatory testimony on the defendant's behalf at a severed trial but would not at a joint trial abridged the requirements of Rule 14 of the Federal Rules of Criminal Procedure and the defendant's constitutional due process guarantees.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	3
OPINIONS BELOW	4
JURISDICTION	4
CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF EVIDENCE INVOLVED	4
STATEMEN OF THE CASE	5
The Trial	5
The Decision of the Court Below	5
REASONS FOR GRANTING THE WRIT	6
1. The Decision Below Conflicts With the Decision of Another Court of Appeals That A Severance Should be Granted Upon Demonstration That A Co-Defendant Was Likely to Testify At A Severed Trial And The Testimony Would Be Exculpatory	6
2. The Decision Below Was Contradictory To The Tenents of Rule 14 of the Federal Rules of Evidence and Prejudiced the Petitioner	7
CONCLUSION	8
APPENDIX	9

TABLE OF AUTHORITIES

CASES	Page
Bryd v. Wainwright, 428 F. 2d 1017 (5th Cir. 1970)	6
Deluna v. United States, 308 F. 2d 140	6
United States v. Burkhead, Nos. 80-1534, 80-1535 (8th Cir. 1981)	5
United States v. Escheles, 352 F. 2d 892 (7th Cir. 1965)	6
United States v. Johnson, 356 F. 2d 680, 682 (8th Cir. 1966)	8
United States v. Starr, 584 F. 2d 235 (8th Cir. 1978, cert. denied 439 U.S. 1115)	7
United States v. Wofford, 562 F. 2d 582, 586 (8th Cir. 1977)	7

IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1981

No.

ECTORE GREGORIO GARCIA,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, appears in the appendix at page 9. The opinion of the court of appeals denying rehearing appears in the appendix at page

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1981. A timely petition for rehearing was denied on May 18, 1981. Due to a legal dilemma facing the Petitioner, an application was made to this Court to allow an extension of time within which to file this Petition. The application was filed on July 17, 1981. The application requested a thirty (30) day extension of time within which to file this Petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Rule 17 (1) (a).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 14 is set forth in the appendix at page 9. The Fifth Amendment to the United States Constitution is set forth in the appendix at page

STATEMENT OF THE CASE

The Trial

The Petitioner was indicted for one (1) count of conspiracy to distribute cocaine, in the Western District of Missouri, in violation of 21 U.S.C. Section 846. The Petitioner moved for severance pre-trial based on a co-defendant's proffered desire to testify exculpatorily for him in a severed trial. (R.4) The co-defendant filed a pre-trial Motion in Limine outlining the substance of his testimony and that he was prepared to offer same at a severed trial. (R-5; copy of motion supplied in appendix at page 9.) The Government stated, unequivocally, that if the co-defendant testified according to his proffer, it would seek to impeach him, using his conviction for a prior substantive offense related to the matter then at bar. (Tr-1, p. 38) Complicating the Petitioner's and the co-defendant's position was the trial court's refusal to rule whether the Government could impeach the co-defendant. The court of appeals found this to be error and reversed the co-defendant's conviction. [**United States v. Burkhead**, Nos. 80-1534, 80-1535 (8th Cir. 1981)] The co-defendant's Motion in Liminie and the Petitioner's Motion for Severance were denied. (Tr-1, pp. 40-41, 48) and the co-defendant did not testify in the Petitioner's behalf. The Petitioner's trial commenced on March 31, 1980. A jury verdict of guilty was returned against the Petitioner and the co-defendant on April 4, 1980. (Another co-defendant was severed based on insufficient evidence.) (Tr-5, p.859) The Petitioner was sentenced on July 19, 1980, to be incarcerated for a period of ten (10) years, pursuant to 18 U.C.S. 4205 (b) (2), and a fine of Ten Thousand Dollars ($10,000.00).

The Decision of the Court Below

In the Petitioner's appeal and motion for rehearing, he asserted that both the trial court and the court of appeals misapprehended the extent that the co-defendant's proffered testimony would exculpate the Petitioner, as well as misapprehending the extent of testimony required by the co-defendant's proffer. The trial judge apparently felt that the co-defendant must show that he would definitely testify at a severed trial. The trial judge also felt that the testimony proffered in the co-defendant's motion in limine did not sufficiently demonstrate the substance of the co-defendant's testimony. The court of appeals affirmed, finding that the co-defendant's proffered testimony "would merely tend to contradict a few details" of the Government's case. Finding that the Petitio-

ner did not show that the testimony "would have been exculpatory", the court of appeals declined to reach the issue of whether the co-defendant would have been likely to testify at a separate trial.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of Another Court of Appeals That A Severance Should Be Granted Upon Demonstration That A Co-Defendant Was Likely to Testify At A Severed Trial And The Testimony Would Be Exculpatory

The lower court agreed with the trial court in finding that there "was no showing that (the co-defendant's) testimony would be exculpatory. (Petitioner) did not demonstrate the substance or the exculpatory effect of the desired testimony".

The Petitioner submits that the Government's entire case against him was dependent upon the testimony of an unindicted co-conspirator. The proffered exculpatory testimony directly contradicted and refuted several major sections of the testimony of the Government's key witness, which were, in effect, an overview of the course and events of the alleged conspiracy and which included the chief allegations against the Petitioner. The co-defendant would also have testified that he never had cocaine dealings with the Petitioner.

The lower court's decision conflicts with the decision of the Court of Appeals for the Fifth Circuit in **Byrd v. Wainwright**, 428 F. 2d 1017 (5th Cir. 1970). The decision also conflicts with opinions of courts of appeals of other circuits which have recognized that a defendant need not prove that the proffered testimony would guarantee an acquittal, but simply that it be exculpatory, which is defined in Black's Law Dictationary, Fourth Edition, as "clearing or tending to clear from alleged fault or guilt". See **United States v. Escheles**, 352 F. 2d 892 (7th Cir. 1965), **Deluna v. United States**, 308 F. 2d 140.

In **Byrd**, the exculpatory testimony offered by Byrd's counsel was that he (the attorney) overheard conversations among other co-defendants that his client was not at the scene of the rape, for which he was charged, and that would be their testimony if allowed to testify at a severed trial. Byrd moved for severance alleging that he would seek his co-defendant's testimony and that he could not compel them to testify at a joint trial.

Petitioner suggests that the proffer of testimony in his case which was specified by the co-defendant's attorney and memorialized for the record in the motion in limine is more far reaching and specific than that proffered in **Byrd**.

Thus, the instant case conflicts directly with **Byrd**, and is consistent with other decisions of the courts of appeals which mandate a severed trial in such circumstances as were existent below, and such failure to sever resulted in prejudicial abuse of the Petitioner's Fifth Amendment guarantee to due process.

Both the district court and the court of appeals found the co-defendant's testimony to be of little value to the Petitioner's case. In so doing, the courts passed on the weight the jury would give to the proferred testimony and the creditability they would give to the Government's key witness. The trial court should have given the Petitioner the opportunity to get the co-defendant's testimony before the jury; as stated in **Escheles, supra**, "... regardless of how we might regard the credibility of that witness or the weight of his testimony".

(Since the lower court did not reach the issue of whether it was demonstrated that the co-defendant would have testified, that issue will not be discussed here, other than to comment that the law is clear, in many circuits, that a co-defendant need only show a likelihood of testifying. **United States v. Starr**, 584 F. 2d 235 (8th Cir. 1978, cert. denied 439 U.S. 1115); **United States v. Wofford**, 562 F. 2d 582, 586 (8th Cir. 1977), **United States v. Escheles, supra**.)

2. The Decision Below Was Contradictory To the Tenents of Rule 14 of the Federal Rules of Evidence and Prejudiced the Petitioner

The trial court's refusal to sever the Petitioner severely prejudiced him. The co-defendant was the only witness who could offer certain exculpatory testimony. If the co-defendant voluntarily testified at a joint trial the Government would have impeached him with his prior convictions for related substantive offenses which would have prejudiced the co-defentant and, to some extent, the Petitioner. If the Petitioner had called his co-defendant to testify, the co-defendant, without the benefit of a ruling whether the court would allow the Government to so impeach him, would have exercised his Fifth Amendment right to remain silent, also embarrassing and prejudicing the Petitioner. Without the exculpatory testimony of the co-defendant, the Petitioner was unable to attack the Government's key witness against him.

In **United States v. Johnson**, 356 F. 2d 680, 682 (8th Cir. 1966), cert. denied 385 U.S. 857 (1966), the court stated the prime consideration in granting a severance is "... the possibility of prejudice..." See **Escheles, supra.**, and **Starr, supra**.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to renew the substantial question presented by the decision of the United States Court of Appeals for the Eighth Circuit.

Ectore G. García
Pro Se
Petitioner/Defendant

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Order of the Court of Appeals for the Eighth Circuit Affirming the Judgment of the District Court	9
Order of the Court of Appeals Denying Rehearing	9
Rule 14 of the Federal Rules of Criminal Procedure	13
Fifth Amendment to the Constitution of the United States	13
Motion in Limine	14

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1536

United States of America,
Appellee,

v.

Ectore Gregorio Garcia,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 13, 1981

Filed: April 21, 1981

Before HEANEY, ROSS and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

Defendant-apellant Ectore Gregorio Garcia was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. P. 846. He challenges the conviction on the grounds that the district court erred by unduly restricting his cross-examination of a key government witness and by refusing to sever his trial from that of his co-defendants. We affirm.

Garcia argues that his Sixth Amendment right to confront witnesses who testify against him was abridged by the trial court's

limiting cross-examination of a primary government witness, Thomas Steidle. Steidle was an unindicted co-conspirator who testified under a grant of immunity for the cocaine violations. At trial, the district court refused to permit Garcia's counsel to cross-examine Steidle about a number of prior "bad acts." Specifically, Garcia's attorney sought and was refused permission to ask Steidle whether (1) he was a homosexual; (2) his wife was a prostitute; (3) he had simulated beating his wife with whips during the nude dance act performed by him and his wife; (4) he had carried a concealed weapon; (5) he had pled guilty to misdemeanor charges of obscenity and drunk and disorderly conduct; (6) he had beaten a Kansas City man named Garrett; and (7) he knew the effects of amphetamines or heroin.[1]

Ordinarily, defense counsel should be given wide latitude in cross-examining witnesses about matters related to credibility or bias. See **United States v. Quinn**, 543 F. 2d 640, 651 (8th Cir. 1976); **United States v. Pfeiffer**, 539 F. 2d 668, 671 (8th Cir. 1976). In this case, however, we are satisfied that the district court did not abuse its discretion in restricting the scope of the cross-examination of Steidle. The attorneys for all the defendants were permitted to cross-examine Steidle at lenghth. Cross-examination by the three defense lawyers covered nearly 200 pages of transcript; nearly one-quarter of that was the examination by Garcia's lawyer. Moreover, the court permitted defense counsel to question Steidle, at least indirectly, about many of the items that Garcia now asserts were erroneously excluded. Included in the cross-examination were questions concerning Steidle's prior drug dealing, his motives for incriminating the defendants, his nude dance act, his[1] addiction to heroin and use of other drugs, and suspicion by law enforcement authorities that he was involved in a murder. In view of the broad inquiry permitted, we will not disturb the district court's ruling that the perjudicial effect of the challenged evidence outweighed its probative value on the question of Steidle's truthfulness.

---

[1] Garcia also argues that the court erred in refusing to permit his counsel to cross-examine another government witness, Bill Powell, about whether Steidle had sai l he had killed a black woman. Although Garcia suggests otherwise in his brief, the court did not specifically rule that he could not ask Steidle about the alleged murder. Garcia's lawyer did not ask the court to decide whether such inquiry was permissible. Under these circumstances, there was no error in refusing to permit cross-examination of Powell on the question.

Garcia's sencond argument on appeal is that the district court erred in refusing to deny his motion for severance. Although he asserted a number of reasons for severance in the district court, Garcia bases his appeal on the ground that the joint trial prevented him from presenting the exculpatory testimony of his codefendant, Darrel Burkhead. The loss of this testimony, he asserts, caused him to suffer sufficient prejudice to mandate severance under Fed. R. Crim. P. 14.

The original indictment in this case contained six substantive counts along with the conspiracy count at issue in this appeal. The district court severed the conspiracy count from the remaining counts and tried the substantive charges first. At that earlier trial, codefendant Darrel Burkhead testified in his own defense. He did not testify at the second trial, however, because he did not know whether his conviction on five of the substantive counts could be used to impeach him if he did.[2] Because a few of the statements in Burkhead's earlier testimony tend to contradict certain portions of the testimony of the government's witnesses, Garcia contends that he should have been entitled to have Burkhead testify on his behalf in a separate trial.

"In this circuit, it is not reversible error to deny severance requested on the ground that a defendant wants to call a codefendant as a witness, unless the defendant shows that the codefendant is likely to testify at a separate trial and the testimony would exculpate him." **United States v. Starr**, 584 F. 2d 235, 239 (8th Cir. 1978), **cert. denied**, 439 U.S. 1115 (1979). The government argues that Garcia has failed to establish either that Burkhead was likely to testify at a separate trial or that the testimony would exculpate him.

We agree that there was no showing that Burkhead's testimony would be exculpatory.[3] Garcia did not demonstrate the substance or the exculpatory effect of the desired testimony. **See United States v. Marable**, 574 F 2d 224, 230 - 231 (5th Cir. 1978); **United States v. Jackson**, 549 F. 2d 517, 524 (8th Cir.), **cert. denied**, 430

[2] We have this day determined that the district court erred in refusing to rule on whether such impeachment would be permitted. **United States v. Burkhead**, Nos. 80-1534 and 80-1535 (8th Cir. 1981).

[3] Because we conclude that Garcia did not show that Burkhead's testimony would have been exculpatory, we need not and do not decide whether Garcia demonstrated that Burkhead would have been **likely** to testify at a separate trial.

U.S. 985 (1977). We may, however, discern the substance of Burkhead's expected testimony from two sources: (1) Burkhead's motion **in limine** setting forth the details of his expected testimony where he able to testify without fear of impeachment on the substantive counts, and (2) Burkhead's testimony at the first trial. After carefully reviewing the transcript of the first trial and Burkhead's motion **in limine**, we are convinced that they demonstrate that Burkhead's testimony would merely tend to contradict a few details of the government's case against Garcia. **See United States v. Abraham**, 541 F. 2d 1234, 1240 (7th Cir. 1976), **cert. denied**, 429 U.S. 1102 (1977).

Indeed, much of Burkhead's earlier testimony would corroborate the government's evidence against Garcia. **See United States v. Ellsworth**, 481 F. 2d 864, 870 (9th Cir.), **cert. denied**, 414 U.S. 1041 (1973). Accordingly, we hold that the district court did not abuse its discretion in refusing to grant Garcia's motion to sever the trial of the two defendants.

The judgment of conviction is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1536 September Term: 1980

United States of America,
Appellee,

vs.

Ectore Gregorio Garcia,
Appelant.

Appeal from the United States District Court for the Western District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 18, 1981

RULES OF CRIMINAL PROCEDURE

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the count may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.
(As amended Feb. 28, 1966, eff. July 1, 1966.)

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE UNITED STATES DICTRICT COURT
FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

Plaintiff,

s. No. 79-00115-01/02-CR W 1

DARREL L. BURKHEAD, PAULA C.
BURKHEAD, ECTORE GARCIA.

Defendants.

DEFENDANTS DARREL L. BURKHEAD AND
PAULA C. BURKHEADS
MOTION IN LIMINE AND SUGGESTIONS
IN SUPPORT THEREOF

Comes now the defendants Darrel L. Burkhead and Paula C. Burkhead, by and through their attorneys of record and moves this Honorable Court for an order suppressing in the use in evidence, and prohibiting plaintiff's attorneys and witnesses for the plaintiff from mentioning, referring to or admitting in evidence the following:

1. The Verdicts of guilty against the defendant Darrel L. Burkhead in this cause on Counts II, III, IV, V and VI.

2. Any evidence pertaining to the alleged travel by Tom Steidle from Kansas City, Missouri to Miami, Florida on March 16, 1978, which was the subject matter of overt act 15 to Count I, and of Count VII of the Indictment upon which the defendant Darrel Burkhead was found not guilty.

3. The Stipulation entered into by and between the attorneys for the plaintiff and the defendant Darrel Burkhead, which Stipulation was used in the previous trial in this matter upon Counts II through VII, and which said Stipulation was not entered into by the defendant Paula C. Burkhead or the defendant Ectore Garcia.

That in support of this motion the defendants Darrel L. Burkhead and Paula C. Burkhead state:

1. That the defendant Darrel L. Burkhead was originally charged in the Indictment filed herein with Counts I through VII. That the Court on its own motion and with the consent of the Government entered into an order severing Count I from Counts II through VII and the defendant Darrel L. Burkhead proceeded to trial on Counts II through VII.

Testimony given in the original trial of the defendant on Counts II through VII and defendants would request that the Court review said transcript in its determination of the issue raised in this motion.

9. That the defendants and each of them would make the following offer of proof regarding the testimony of the defendant Darrel Burkhead.

(a) That the defendant would refer the Court to the transcript of the testimony of the original trial of the defendant on Counts II through VII which includes the testimony of the defendant during that trial.

(b) That the defendant Darrel Burkhead would testify that he was not guilty of engaging in the conspiracy or engaging in the overt acts alleged in the Indictment, including but not limited to:

(i) That the defendant did not engage in a telephone conversation with Thomas Steidle on or about December 26, 1977 in which the defendant agreed to purchase a kilo of cocaine for $40,000.00.

(ii) That the defendant did not purchase from Thomas Steidle or Ectore Garcia, or agree to purchase from them, 1/2 kilo of cocaine on or about December 27, 1977, December 28, 1977 or on any other date.

(iii)That the defendant did not give or pay to Thomas Steidle any money in exchange for 1/2 kilo of cocaine on any occasion.

(iv)That the defendant Darrel Burkhead did not display to "Rocky the Arm" Phillipiano, a quantity of cocaine for sale at the defendant's home or anywhere else.

(v) That the defendant did not fly to Columbus, Ohio in June of 1978 or on any other occasion for the purpose of meeting Ectore Garcia.

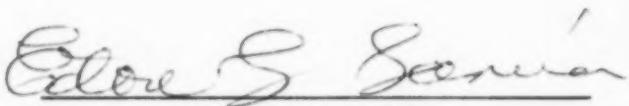
10. That if the Court rules that the verdict of guilty on Counts II through VI of the Indictment are admissible to impeach the defendant Darrel Burkhead if he testifies in this trial:

(a) The defendant Darrel L. Burkhead may refuse to

"I certify that three (3) copies of this Petition have been mailed to the

Solicitor General of the United States
Room 5614,
Department of Justice,
Washington, D.C. 20530

this 17 day of September, 1981



ECTORE G. GARCIA